

U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
Pension and Welfare Benefit Programs
Washington, D.C. 20216



August 11, 1977

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Mr. Patrick C. O'Donoghue
O'Donoghue & O'Donoghue
1912 Sunderland Place, N.W.
Washington, D.C. 20036

OPINION 77-55

404(a)(1)(A)

406(a)(1)(D)

Dear Mr. O'Donoghue:

This is in response to your letter of August 12, 1975, concerning the application of the fiduciary responsibility provisions set forth in Part 4 of Title I of the Employee Retirement Income Security Act of 1974 (the Act) to a transfer by the trustees of the Pipe Fitters Local 636 Vacation & Holiday Fund (the Fund) of accumulated surplus in the Fund to Pipe Fitters Local No. 636 (the Local Union).

Your letter indicates that for many years, trustees of the Fund have made yearly transfers to the Local Union of the accumulated surplus in the Fund derived from interest and other earnings. The members of the Local Union have now evidenced their desire by signing Assignment Forms, and the Local Union trustees have requested, that the Fund trustees transfer to the Local Union earnings of the Fund accrued through December 31, 1974. As they have with respect to transfers made in the past, the Fund trustees have sought to protect the Fund and themselves regarding the instant requested transfer by requesting and receiving from the Local Union a Hold Harmless Agreement, a copy of which was attached to your letter.

Based on the above information, your letter requests our opinion as to whether a transfer as described above made after January 1, 1975, would be in violation of ERISA, whether the Fund trustees can be held civilly or criminally liable for such a transfer, and whether an exemption can be granted for the transfer if it does violate ERISA. In this regard, your letter discusses only the prohibited transaction provisions of section 406(a)(1)(D) of the Act.

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Section 406(a) (1) (D) of the Act prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that the transaction constitutes, among other things, the direct or indirect transfer of assets of a plan to a party in interest. The Local Union is a party in interest with respect to the Fund pursuant to section 3(14) (D) of the Act. Under section 414(a) of the Act the effective date of section 406(a) (1) (D) is January 1, 1975.

Accordingly, a transfer of the accumulated surplus of the Fund to the Local Union after January 1, 1975, would be a prohibited transaction under section 406(a) (1) (D), notwithstanding the fact that the surplus was earned prior to December 31, 1974.

Section 408(a) of the Act empowers the Secretary of Labor to grant exemptions from the restrictions imposed by section 406 under certain conditions described in section 408(a). Requests for exemptions under section 408(a) should be made according to the procedure set forth in ERISA Procedure 75-1, a copy of which is enclosed.

You should note, however, that section 404(a) (1) (A) of the Act, which contains general fiduciary responsibility provisions applicable to fiduciaries of employee benefit plans, requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries of the plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan. Section 404(a) (1) (D) requires that a fiduciary discharge his duties with respect to a plan in accordance with the documents and instruments governing the plan, but only insofar as these documents and instruments are consistent with the provisions of Title I of the Act, including the other provisions of section 404(a) (1).

Based on the information contained in your letter, it appears that the proposed transfer of the accumulated surplus in the Fund to the Local Union would violate section 404(a) (1) (A) of the Act in that it would not be for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Fund. No exemptions may be granted from the

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fiduciary responsibility provisions of section 404(a)(1). Thus, any exemption that may be granted under section 408(a) of the Act from the prohibited transaction provisions of section 406 would not affect the applicability of section 404(a)(1) of the Act with respect to the transaction covered by the exemption.

Finally, section 409(a) of the Act provides that any plan fiduciary who breaches any responsibility, obligation or duty to the plan imposed by Title I of the Act is liable to the plan for any losses incurred by the Plan resulting from the breach, or for any profits obtained by the fiduciary by using the assets of the plan, or for other equitable or remedial relief, including removal from his position as plan fiduciary. These are civil liabilities; the Act does not impose any criminal liabilities for violations of the fiduciary responsibility provisions set forth in the Act. However, criminal liabilities may be imposed under the provisions of other statutes, such as section 302(c) of the Labor-Management Relations Act of 1947, as amended. Because we are authorized to administer only the provisions of the Employee Retirement Income Security Act of 1974, we have offered no opinion on the applicability of other laws to the transfer described in your letter.

Sincerely,

Fred W. Stuckwisch
 Director
 Office of Regulatory Standards
 and Exceptions

Enclosure